

## NATURAL RIGHTS: CONFLICT AND CONSEQUENCE

ERVIN H. POLLACK\*

*Using the recent Griswold case as a starting point, Professor Pollack discusses various jurisprudential philosophies and their applications in the constitutional sphere. He evaluates the approaches taken by the absolutists, the advocates of the balancing-of-interests test and the proponents of the libertarian theory. The author further discusses these interpretations with reference to the significant Supreme Court decisions which have utilized them. He concludes that the lack of a unital philosophy in the Supreme Court may very well be a contributing factor to the success of our democracy.*

In a recent decision of the Supreme Court of the United States, the Connecticut anti-contraceptive statute was declared unconstitutional.<sup>1</sup> Justice Douglas, who delivered the opinion of the Court, held that the statute violates a constitutional right of privacy emanating from several provisions of the Bill of Rights. Moving beyond the more traditional concepts of freedom, as in desegregation, this ruling and the concurring and dissenting opinions of the Court reflected such marked differences of legal theory and jural method as to invite comment and discussion.

If viewed *sui generis*, the issues raised by the decision fall into four distinguishable, yet to some degree overlapping, categories: (1) the authoritative function of the state; (2) the judicial function; (3) the identification and distinction between applicable legal concepts; and (4) the scope of natural rights.

### I. THE AUTHORITATIVE FUNCTION OF THE STATE

The framers of our constitution, deriving their political theories from Locke and others, conceived that the individual possessed certain infeasible, primary rights, and that the function of the state was

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\* Professor of Law and Director of Research Services, The Ohio State University College of Law.

<sup>1</sup> Griswold v. Connecticut, 381 U.S. 479 (1965).

to protect these rights against governmental intrusion or group encroachment.

This concept of natural rights developed through the interpretation of natural-law principles, and gave validity and efficacy to such rights through the application of the law of nature. It reflected a change of emphasis from classical construction, with its duties and prohibitions, to that of fundamental democratic rights, with accompanying restrictions placed on the authority of the state. In this sense, the American Constitution, strongly suggestive of Locke's philosophy, emphasizes individual freedom with limitations on governmental power. Thus, natural rights are subject to legal guarantees embodied in the Constitution or they are protected by secular law. In this milieu, machinery is created to give natural rights a legal status and to gain for them recognition and protection as legal rights.

The word "rights" has a very precise meaning which is distinctively different from its popular definition. Professor Mark De Wolfe Howe carefully made this distinction.

As I read the original Constitution and its Bill of Rights it expounds a political theory which is grounded in the belief that liberty is the by-product of limitations on governmental power, not the objective of its delegation. . . . These distinctions I believe to be of profound importance. When they are forgotten we begin to use the word "rights" . . . in misleading ways. Our rights, as the framers conceived them, were essentially certain specified immunities. They were not claims on, but assurances against the government. . . . The Bill of Rights defines our immunities; it does not catalogue our claims.<sup>2</sup>

Such identification has been characterized as commonplace<sup>3</sup>; however, its simplicity is misleading since there has been little consensus and many significant departures from this meaning. Explanations have ranged from a formative definition of immunity to modern identifications as interests, claims, or privileges. In the latter settings, prohibitions of the Constitution are admonitional which Congress may or may not observe.

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<sup>2</sup> Hutchins, *Two Faces of Federalism* 5 (1961).

In opposing the Bill of Rights as being unnecessary, Alexander Hamilton expressed a similar thought. He stated that ours is a government of delegated powers and that it was not granted the power to intrude upon basic individual rights. *Federalist* No. 84, at 578-79 (Cooke ed. 1961) (Hamilton).

<sup>3</sup> Professor William Van Alstyne made the passing comment: "After all, even the least sophisticated student appreciates the fact that the fourteenth amendment does not grant or establish anything as a legal right; it merely provides a limited immunity against state divestiture of certain prerogatives which all persons may claim as human beings." "Mr. Justice Black, *Constitutional Review*, and the *Talisman of State Action*," 1965 *Duke L.J.* 219-20.

Justice Black has made his disagreement with the latter view well known.<sup>4</sup> In his famous James Madison Lecture at New York University, he said: "It is my belief that there *are* 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'"<sup>5</sup>

Framed in history and language, he described this limitation on governmental power as plain, offering no exceptions. "If the Constitution withdraws from Government all power over subject matter in an area, such as religion, speech, press, assembly, and petition, there is nothing over which authority may be exerted."<sup>6</sup>

In describing the "rights" enumerated in the Bill of Rights as immunities, Professor Howe was equally Hohfeldian in his thinking. If the "rights" are immunities, then the government's power to interfere with individual liberties is limited, for these "rights" were reserved by the people to themselves. However, once classified as coming within the category of constitutional rights, a right is absolute and cannot legally be limited by governmental action.

Under the Constitution, an immunity is a freedom of an individual from having a given legal relation altered by an act of the government. But this meaning, as Justice Black acknowledged, is not without its complexities. If applied without exception or qualification, it could defeat the very objectives of a free society which fosters it. To ensure continuous freedom of its people, a free government must legislate restrictions. Any other arrangement could result in anarchy or even institutional collapse. Locke recognized this fact and cautioned that the natural liberty of the individual is not suggestive of total freedom from legal restraint, for "in all the states of created beings capable of laws, where there is no law, there is no freedom."<sup>7</sup> Thus, "the end of law is not to abolish or restrain but to preserve and enlarge freedom."<sup>8</sup>

Paradoxically, the immunity principle cannot be exercised by government without restriction; yet, the principle does not allow for ordinary restraints essential to the normal function of government, for it is an unqualified denial of power of the government to engage in enumerated functions.

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<sup>4</sup> *E.g.*, Black, "The Bill of Rights," 35 N.Y.U.L. Rev. 865 (1960); "Justice Black and First Amendment 'Absolutes': A Public Interview," 37 N.Y.U.L. Rev. 549 (1962)

<sup>5</sup> *Id.* at 867. For comments on the absolute approach, see Griswold, "Absolute is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions," 8 Utah L. Rev. 167 (1963) and books and articles listed, at 169 n.8.

<sup>6</sup> *Id.* at 875.

<sup>7</sup> Second Treatise of Civil Government § 57, at 148 (Cook ed. 1947).

<sup>8</sup> *Ibid.*

However, the absolutists do not accept this approach to the Bill of Rights. As Justice Black indicated, "Nobody has ever said that the First Amendment gives people a right to go anywhere in the world they want to go or say anything in the world they want to say."<sup>9</sup> Referring to the aphorism about shouting "fire" in a crowded theater, Justice Black described this conduct as a disturbance, having nothing to do with free speech or what is exclaimed. If the individual stood up during a musical show and recited the lines of *Invictus*, this would be equally disturbing and would constitute disorderly conduct. The basis of the disorder is not *what* is shouted but *that* the person shouted. However, in this situation the absolutist departs from the immunity rule and weighs the right to speak against peaceful conduct and chooses the latter course, thus ensuring the exercise of orderly government. But despite its practical import, this restriction is a departure from the principle of immunity.

The late Professor Alexander Meiklejohn, a leading advocate of the absolute doctrine, introduced further anomalies into the immunity rule. He acknowledged that certain forms of speech require regulation and exclusion from constitutional protection.<sup>10</sup> The primary commercial purposes of advertising, lobbyist activities and radio remove them from this safeguard. In fact, Professor Meiklejohn suggested that phases of individual scholarship may reach a position requiring abridgment to safeguard human welfare.<sup>11</sup> Such blurred distinctions bring to mind Justice Frankfurter's admonition, "Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules."<sup>12</sup>

The basic conflict in the absolutist's position is patent. If a "right" is an immunity and under an immunity a state has no power to restrain the individual, how can any governmental restraint of a right, even the inoffensive and essential, be indulged? The state has no such power and to allow its invocation is to introduce a new meaning into "right."<sup>13</sup>

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<sup>9</sup> Black, *supra* note 4, at 558.

<sup>10</sup> Meiklejohn, *Free Speech* 39, 104 (1948).

<sup>11</sup> *Id.* at 99-100. Professor Chafee was critical of this view. Book Review, 62 *Harv. L. Rev.* 891, 900 (1949).

<sup>12</sup> *Dennis v. United States*, 341 U.S. 494, 524 (1951).

<sup>13</sup> Mr. Justice Black, it would seem, avoided this dilemma by using the Hegelian dialectic with its synthesis of opposites. The dialectic thesis is: Freedom of speech may not be abridged under the first amendment of the Constitution. Its opposite, the antithesis, is: Consistent with maintenance of order and the protection of life, freedom of speech may be abridged. The synthesis follows: Freedom of speech may not be abridged, in its non-literal sense, but the right to expressive or inciting speech may be deprived. But this merely avoids the "immunity" problem; it does not answer it.

In another respect, the absolutists argue that the prohibitions of the Constitution are more than admonitions which government can abandon at will. Justice Black made a dual charge against this constitutional interpretation. He stated that the language of the Constitution and Bill of Rights is clear and had an unobscure meaning to the draftsmen. In addition, the history and purposes of the Bill of Rights "point to the creation of a government which was denied all power to do some things under any and all circumstances and all power to do other things except precisely in the manner prescribed."<sup>14</sup>

This unital theory reflects concern with limitation on power but not with policy. It has been suggested that such narrow interpretation is foreign to Locke's thinking.<sup>15</sup> Locke's famous discourse on civil government was inspired by a number of events, beginning with an attempt of the House of Stuart to establish an absolute monarchy and culminating in the Glorious Revolution of 1688. But the discourse had more than one dimension. Locke's essay secured the throne of "the Great Restorer" and made good his title "in the consent of the people." But it also implicitly contained the classical principle of the "common good," imbuing the doctrine with purpose. Thus, the concept falls markedly short of absolute rights.

Professor Walton Hamilton demonstrated this view in relation to Locke's concept of property. He characterized the modern interpretation of the Lockian theory in these words:

The background of Locke's thought was forgotten; his silences were overlooked; the conditions and preadventures in his argument were brushed aside. His propositions no longer limited in meaning by his reasons, became general truths; his expediencies, freed from the exigencies of cause and occasion, blossomed out as cardinal principles of government.<sup>16</sup>

The property which Locke described as a natural right was personal, based on labor, and the natural right to appropriate to one's own use included land as well as produce. His limited concept of property was appropriate for a society where the owner managed his own

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<sup>14</sup> Black, *supra* note 4, at 867. Madison explained that the Bill of Rights was intended to limit and qualify the power of government "by excepting out of the grant of power these cases in which the Government ought not to act, or to act only in a particular mode." 1 *Annals of Cong.* 437 (1789).

<sup>15</sup> Hamilton, "Property—According to Locke," 41 *Yale L.J.* 864 (1932).

On the other hand, Rousseau's philosophy provided a more absolutistic formula. He prescribed natural rights in terms agreeable to the common man and evolved a philosophy of democracy which was founded on equalitarian principles. Locke's theory is noticeably deficient in this latter regard.

<sup>16</sup> *Id.* at 872.

lands or the craftsman labored in his own shop. Locke did not conceive of industrial wealth and capital or property-separable-from-personality. Locke thought of liberty and property as synonymous. As the creation of man, property attained a sacredness identifiable with personality.

But Professor Hamilton further commented:

Neither "liberty" nor "property" is antecedent to the state or beyond the domain of public control. Each is but a name for a cluster of prevailing usages, —certain to change and subject to amendment, —which binds the individual to the social order. The property which Locke justified by natural right was an isolated possession of personal origin; the property which is the concern of constitutional law is an aggregate of rights inseparable from the gigantic collectivism of business.<sup>17</sup>

And so it is with other natural rights.

This ideological disunity focuses attention on the flexibility of the formative philosophy in America. Locke's political thought makes sense only when recognized as a rationalization of the Whig Revolution. As applied to conditions in the American Colonies, it became assertive and aspirational—an effective instrumentality to further the American Revolution. As a formula for implementing governmental functions, with essential operative restraints, it fostered problems and dilemmas.

## II. THE JUDICIAL FUNCTION

The Founding Fathers did not view the Constitution as a static, fixed instrument, with its interpretation set by historic principle. Proceeding on the theory of the consent of the governed, Jefferson recognized the evanescent quality of the Constitution and the law. In a letter to Madison in 1789, he urged that each generation should renew that consent if the law is to possess obligatory strength. He said, ". . . no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation."<sup>18</sup>

Jefferson's suggestion presented practical difficulties, since it was fraught with legal uncertainty and political instability. However, such limitations did not foreclose the constitutional growth which Jefferson recognized as essential to a progressive society. Constitutional development was introduced by judicial interpretation, simultaneously allowing for structural stability in government.<sup>19</sup>

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<sup>17</sup> *Id.* at 879.

<sup>18</sup> Letter to James Madison, September 6, 1789, Basic Writings of Thomas Jefferson 591 (Foner ed. 1944).

<sup>19</sup> It has been suggested that the range of judicial interpretation of the Constitution

This judicial dynamism has been described by Justice Holmes with characteristic succinctness and clarity:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they had created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.<sup>20</sup>

In an earlier period John Marshall also invoked this principle but minimized the judicial role and the developmental attributes of the judicial process. He stated:

A constitution, to contain as accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language.<sup>21</sup>

In deemphasizing the judicial function and describing its role as minor, Marshall did not anticipate either the range of problems or the divergence of ideologies which an industrial era would create. Neither was he aware of the cleavages which these philosophical theories would produce.

The view that the Constitution is not time-bound in interpretation is subject to one sobering, qualifying consideration. As one authority suggests, there is a distinction between modifications and subversion

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extends from free wheeling judicial legislation as described by Judge Learned Hand to the narrow judicial practices of the House of Lords. Wechsler, "The Courts and the Constitution," 65 Colum. L. Rev. 1001, 1011-12 (1965). Professor Wechsler's "neutral principles" is an intermediate explanation of judicial action. *Ibid.* See Wechsler, "Toward Neutral Principles of Constitutional Law," 73 Harv. L. Rev. 1 (1959), reprinted in Wechsler, *Principles, Politics and Fundamental Laws* 3 (1961). An evaluation of these processes would require separate consideration and would be a departure from the main theme.

<sup>20</sup> *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

<sup>21</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

of a constitutional provision through interpretation.<sup>22</sup> Sanctions permitted to ensure the safety of the nation, which restrict freedom of speech, such as incitement to race riots, are constitutionally allowed. But interpretations of free speech under the Constitution, which for a slight reason would permit the legislature to suspend such guaranty, are disallowed.

Another theory of interpretation of the Constitution has been enunciated. Described as the historical interpretation, it prescribes that constitutional uncertainties should be resolved in accordance with the meanings of its terms prevalent at the time of its adoption. This view was endorsed by Chief Justice Taney and Mr. Justice Sutherland. In a vibrant dissent in *West Coast Hotel Co. v. Parrish*, which invoked the constitutional validity of the minimum wage law of the State of Washington, Justice Sutherland said:

[T]he meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force. . . .<sup>23</sup>

The issues of judicial review and judicial restraint as applicable to the Court are beyond the purview of this discussion.<sup>24</sup> The words in the Constitution are mere symbols which have been given a variety of meanings. The constancy of the symbols provide an illusion of fixity and certainty in the law, but their application permits a wide range of jural construction. By injecting new or varying content into old phrases, the Supreme Court constantly amends the Constitution. Paraphrasing Justice Holmes, the Constitution is what the courts say it is. It is to this that we owe its vitality, resiliency and longevity. Such continuing jural conflict is reflected in the Supreme Court's decision in the *Griswold* case, in which the majority endorsed Holmes' view and dissenting Justices Black and Stewart followed the historical approach.

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<sup>22</sup> Bodenhimer, *Jurisprudence* 352 (1962).

<sup>23</sup> 300 U.S. 379, 402-03 (1937).

<sup>24</sup> The literature on the topics is voluminous. For recent articles and bibliographic treatment see Strong, "Toward an Acceptable Function of Judicial Review?" 11 S.D.L. Rev. 1 (1966) and Shapiro, "Judicial Modesty: Down With the Old!—Up With the New?" 10 U.C.L.A.L. Rev. 533 (1963).



### III. LEGAL CONCEPTIONS AND JURAL SYSTEMS

The indiscriminate use of the term "rights" to describe an immunity or a privilege has fostered confusion in the law. As has often been stated, our constitutional government was originally framed on a system of limited powers, reserving rights in individuals. However, what were reserved in this context were not actually rights but immunities—restraints on the government.

What then is a right? A right is a legally enforceable claim of one person against another or against the state requiring that the person or the state shall do a given act or shall not do a given act.<sup>25</sup> The relationship can be identified from the standpoint of the individual or state against whom the claim exists. The latter has a duty or a legally enforceable obligation to do or not to do an act. However, in this respect, duty has been given another meaning. Under the Classical Natural Law theory, the person with a "right" is also under a duty.<sup>26</sup> Thus, rights and duties are linked in the one person. These rights are not absolute, but neither can duties and social consequences of acts be ignored. Pope John illustrated such reciprocity between rights and duties:

[T]he rights of every man to life is correlative with the duty to preserve it; his right to a decent standard of living, with the duty of living it becomingly; and his right to investigate the truth freely, with the duty of pursuing it ever more completely and profoundly.<sup>27</sup>

Both the immunity concept and the Classical viewpoint were

<sup>25</sup> See definition in 1 Restatement, Property § 1 (1936); Hohfeld, *Fundamental Legal Conceptions As Applied In Judicial Reasoning* 6, 36-38 (1923).

<sup>26</sup> See *Encycl. Pacem in Terris* of John XXIII §§ 28-33, pp. 10-11 (American Press ed. 1963). Professor Brandon Brown identified the failure to support legal rights without any corresponding legal duties as "an erroneous deviation" from the original meaning of natural law. Brown, "Natural Law and the Law-Making Function in American Jurisprudence," 15 *Notre Dame Law.* 9, 14 (1939).

This relationship of "rights" or "immunities" and "duties" was reflected in earlier Reconstruction legislation. On March 1, 1866, in the House of Representatives floor discussion of § 1 of the Civil Rights Bill, James F. Wilson of Iowa, who managed the bill in the House, posed the rhetorical question, "What is an immunity?" He commented, "Simply 'freedom or exemption from obligation' . . . It merely secures to citizens of the United States equality in the exemptions of the law. A colored person shall not, because he is colored, be subjected to obligations, duties, pains and penalties . . . Whatever exemptions there may be shall apply to all citizens alike. . . ." *Cong. Globe*, 39th Cong., 1st Sess. 1117 (1866). Consistent with this, it should be noted that § 1 of the Civil Rights Act of 1866 made specific marginal reference to rights and obligations, and the Act indicated that white and colored citizens "shall be subject to like punishment, pains, and penalties." 14 Stat. 27 (1866).

<sup>27</sup> *Id.* § 29 at 10.

expressed in recent formal natural rights declarations. *The Universal Declaration of Human Rights* identified duties of the individual to the community as correlative to "the free and full development of his personality."<sup>28</sup> On the other hand, the *European Social Charter* did not refer to either duty or responsibility.<sup>29</sup>

If a right is an immunity, there is no correlative duty, since an immunity is a freedom from control of another and the individual is under no duty in the exercise of his freedom. An "absolute" principle is not circumscribed by exceptions or limitations since it is not state inspired. A claim, on the other hand, is an affirmative assertion which is derived from the state. Hohfeld said that the clue to the concept "right," when used as a synonym for claim, lies in the correlative "duty."<sup>30</sup> These distinguishable concepts give rise to different legal doctrines.

Under the Classical theory, the denial of a right (a claim) will be upheld only if it furthers the common good. Such rights or claims are not absolute, and originate in an ideal, not in a social compact. Conversely, a right in the "absolute" sense is an immunity. It is a restriction on governmental power and is not socially conditioned.

Locke's philosophy, on the other hand, is an admixture of two contradictory concepts—immunities and the common good (which is derived from claims). Immunities achieve their force through restraint, and are not concomitant with value judgments. Contrariwise, the "common good" stresses judgmental factors in the assertion or furtherance of claims. In a specific situation, there cannot be a coalescence of a restraint and a claim, since they are directed towards contradictory results. Each relationship must be delimited to either one or the other accomplishment; they cannot individually pursue both, just as an animal cannot be both a dog and a cat. By their nature, they are mutually exclusive of each other. However, Locke's theory suggests such contradictory commingling and fallaciously portends systematic projection.

To pursue the problem further, a "privilege" is "one's freedom from the right or claim of another."<sup>31</sup> It is the legal freedom of a person as against another to do an act or a legal freedom not to do an act.<sup>32</sup> It is significant that this freedom is provided by the state

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<sup>28</sup> The Declaration was adopted on December 10, 1948, by the General Assembly of the United Nations. Art. 29.

<sup>29</sup> Signed on October 19, 1961, by the members of the Council of Europe. European Treaty Series No. 35.

<sup>30</sup> Hohfeld, *op. cit. supra* note 25, at 38.

<sup>31</sup> Hohfeld, *op. cit. supra* note 25, at 7.

<sup>32</sup> 1 Restatement, Property § 2 (1936),

and is not inalienable. The government has or is granted power and in turn grants privileges. Privileges may be granted with limitations and their exercise may be subject to regulatory compliance or conditions. On the other hand, immunities stem from liberty in the people, which is beyond the power of the government to restrict.

The words "right" for "privilege," "right" for "immunity," and "privilege" for "immunity" are used indiscriminately. The effect is a discordant variety of protection under each conceptual category, although all are identified as "rights." Since the conceptions affect powers and benefits differently, they should be viewed hierarchically and not kaleidoscopically.

#### IV. THE SCOPE OF NATURAL RIGHTS

Some differences are clearly visible when James Kent's description of the rights of persons is compared with more modern identifications of economic and social rights. Kent, the American Blackstone, classified the rights of persons as either absolute or relative. Absolute rights belong to individuals in a single, unconnected state, while relative rights are those which arise from civil and domestic affairs.<sup>33</sup> Kent subdivided absolute rights into rights of personal security, personal liberty, and acquisition and enjoyment of property. This distinction was an early recognition of the difference between immunities, which are perceived as absolute rights, and claims which are described as relative rights.

Some modern theorists, influenced by the industrial era, have made no such distinction between absolute and relative rights. Instead, they have broadened the scope of natural rights to include claims under economic and social rights. For example, Jacques Maritain listed an array of rights of the working man—rights to form trade unions, to a just wage, to work itself, to the joint ownership and joint management of an enterprise wherever an associative system can be substituted for the wage system, to relief, to unemployment insurance, to sick benefits and to social security.<sup>34</sup>

In his dynamic encyclical letter, *Pacem in Terris*, Pope John XXIII identified man's economic rights with free initiative and the right to a job.<sup>35</sup> Related to these rights is the right to satisfactory working conditions in which physical health is not endangered, with special attention given to the young and to women. The enumerated rights extended "to the means which are necessary and suitable for

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<sup>33</sup> 2 Kent, *Commentaries on American Law* 1 (1st ed. 1827).

<sup>34</sup> Maritain, *Rights of Man and Natural Law* 113-14 (1945).

<sup>35</sup> *Pacem in Terris*, *supra* note 26, § 18 at 7.

the proper development of life. These means are primarily food, clothing, shelter, rest, medical care, and finally the necessary social services."<sup>36</sup> The latter functions include the right to security in cases of sickness, widowhood, old age, unemployment, or in any other situation where a human being, without fault, is deprived of the means of subsistence. A worker's right to a just wage, consistent with human dignity, is also imposed.<sup>37</sup>

Another modern agency which has enlarged the scope of natural rights is the United Nations. Articles 22 through 26 of the *Universal Declaration of Human Rights* expanded them to include economic and social rights.<sup>38</sup> These rights extended beyond the traditional rights to encompass the right to work, to periodic holidays with pay, and to employment security. The *Universal Declaration* enumerated other economic and social rights—the right to choose a job, to join a trade union, to equal pay for equal work, and to an adequate standard of living, including housing, medical care and security in the event of sickness, widowhood or old age.

Maurice Cranston, the English political philosopher, in a perceptive study of the *Universal Declaration of Human Rights*,<sup>39</sup> stated that the United Nations is the organization best suited to influence the spread of human rights; however, he felt that the *Universal Declaration* confused traditional natural rights with ideals which may have no positive law foundation. Political considerations have prevented the execution of the covenants necessary to make the *Universal Declaration* a legally binding instrument. In 1953, the United States delegate on the Commission for Human Rights announced that the United States did not intend to sign any treaty on human rights drafted by the United Nations.<sup>40</sup> This reservation stemmed from a concern that the adoption of the covenants would threaten American sovereignty, since a treaty adopted by the Senate would become the supreme law of the land. In addition, such political uneasiness was aggravated by the United Nation's action in regarding both sets of rights—civil and political, and economic and social—as equally authentic. But there is no unanimity of opinion that the right to "holidays with pay" stands

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<sup>36</sup> *Id.* § 11 at 5.

<sup>37</sup> *Id.* § 20 at 8.

<sup>38</sup> The European Convention on Human Rights (1950) is a European continuation of the Universal Declaration of Human Rights, but it does not cover economic and social rights. To that extent, it is not as broad as the *Universal Declaration*; however, as a convention, it is legally stronger than a declaration, and the contracting parties are mutually bound by its provisions.

<sup>39</sup> Cranston, *What Are Human Rights?* (1962).

<sup>40</sup> U.N. Doc. No. E/CN.4/SR.340 (1953).

in the same relative position of paramount importance as do traditional natural rights.

The distinction between immunities and claims becomes increasingly important in relation to civil and economic rights. Civil and political rights are immunities against encroachments of government. They are protections against excesses of government, ensuring freedom of speech, religion, press and assembly, fair trial, security against arbitrary arrest and other historic rights. Economic and social rights are the affirmative claims of the individual against government.

President John Kennedy carefully drew this distinction, identifying immunities as civil liberties and claims as civil rights. He said:

By civil rights we mean those claims which the citizen has to the affirmative assistance of government. In an age which demands that government secure the weak from needless dread and misery, the catalogue of civil rights is never closed. The obligation of government in the area of civil rights is never wholly discharged. . . . The Bill of Rights, in the eyes of its framers, was a catalogue of immunities, not a schedule of claims. It was, in other words, a Bill of Liberties . . . When civil rights are seen as claims and civil liberties as immunities, the government's differing responsibilities become clear. For the security of rights the energy of government is essential. For the security of liberty restraint is indispensable.<sup>41</sup>

In line with this distinction, civil or economic rights, functioning as claims, are structured in legislation while civil liberties or immunities are constitutionally protected. This separation wisely suggests a constitutional delimitation of historic rights and a developmental pattern of economic and social activities through legislation. Liberty is preserved through constitutional assurances that prevent governmental encroachments, and economic and social change is reenforced by legislative action.

## V. CONSTITUTIONAL INTERPRETATION

In the formative period of our history, which preceded the industrial stage, the immunity principle was invoked and natural rights were protected from legislative attack. In *Calder v. Bull*,<sup>42</sup> Justice Chase stated that legislative obligation, in a government established under the social compact, "must be determined by the nature of the power on which it is founded." Thus, an act of the legislature which conflicts with "the great first principles of the social compact, cannot

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<sup>41</sup> Quoted by Edward Bennett Williams, "Inside Labor," *Columbus Citizen-Journal*, July 15, 1965, pt. 2, p. 2.

<sup>42</sup> 3 Dall. (3 U.S.) 386, 388 (1798).

be considered a rightful exercise of legislative authority." Abuses, which "authorize manifest injustice by positive law; or . . . take away that security for personal liberty, or private property, for the protection whereof the government was established," are denied legal force. In other early cases involving legislative violation of property rights, the philosophy of Locke, with its emphasis on the preservation of property rights, was restated.<sup>43</sup>

From the 1870's to the 1930's the Supreme Court emphasized that the very essence of liberty was freedom from governmental interference in private economic and property matters.<sup>44</sup> Rights of property and freedom to contract were conceived to be the "natural rights" of persons and corporations. The landmark decisions are well-known. *Munn v. Illinois*<sup>45</sup> held a law fixing maximum charges for the storage of grain in warehouses to be violative of due process. *Lochner v. New York*<sup>46</sup> declared a statute limiting the working hours in bakeries to be unconstitutional. Minimum wages for women in the District of Columbia, as prescribed by Congressional statute, were ruled in *Adkins v. Childrens' Hospital*<sup>47</sup> to be void. The authority of a state to regulate competition by restricting the issuance of licenses for the manufacture, sale or distribution of ice in an area in the absence of proof of convenience and necessity was denied in *New State Ice Co. v. Liebman*.<sup>48</sup>

But these interests were not specifically prescribed by the Constitution. Nor were they immunities embracing the same restrictions as the integrity of one's physical person or the legal right of ownership of property. Instead they opened a large arena of claims which Roscoe Pound described as interests.<sup>49</sup>

Justice McKenna, in the *Arizona Employers' Liability Cases* objected to such distinction for he said that it menaced all rights, "subjecting them unreservedly to conceptions of public policy."<sup>50</sup> However, as Dean Pound said, "The Fourteenth Amendment did not set up

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<sup>43</sup> For cases and articles supporting this thesis, see Bodenheimer, "Due Process of Law and Justice" in *Essays in Jurisprudence in Honor of Roscoe Pound* 463, 464-68 (Newman ed. 1962).

<sup>44</sup> This early twentieth century approach to economic philosophy has been variously identified. Justice Holmes, in his famous *Lochner* dissent, 198 U.S. 45 (1905), described it as the embodiment of Herbert Spencer's Social Statics theory. *Id.* at 75. But such *laissez-faire* interpretation of due process also is similar to the traditional natural-rights approach, especially in extolling private rights and in supporting business assertiveness.

<sup>45</sup> 94 U.S. 113 (1877).

<sup>46</sup> 198 U.S. 45 (1905).

<sup>47</sup> 261 U.S. 525 (1923).

<sup>48</sup> 285 U.S. 262 (1932).

<sup>49</sup> Pound, "A Survey of Social Interests," 57 Harv. L. Rev. 1, 3 (1943).

<sup>50</sup> 250 U.S. 400, 439 (1919).

these or any other individual interests as absolute legal rights. It imposed a standard upon the legislator. It said to him that if he trenched upon these individual interests he must not do so arbitrarily. His action must have some basis in reason."<sup>51</sup>

#### A. *The Balancing of Interests*

The transformation of natural rights into interests arose through different metaphysical and social concepts. Natural rights had its origin in ontology. To Locke, rights were innate, self-contained platonic essences requiring governmental acquiescence. The social compact served as a convenient assumption to limit the power of government. Through it was introduced the political conception of "inalienable rights," for under the law of nature no man can alienate to the government arbitrary power over himself.

Our Bill of Rights as originally conceived, embodied this popular notion of government, and the judiciary drew its philosophy from these originative sources. So long as our society functioned under a free land economy and the people were agriculturally identified, the immunity doctrine continued as the ideological expression of the group. But the growth of industrialism, with its attending economic and social problems, presented new issues which could not be ignored. State legislatures attempted to correct some of the serious labor and wage abuses of the time by introducing remedial legislation. But the Supreme Court generally sustained the proposition that the rights of property and freedom to contract were natural rights and were not subject to governmental interference. Thus, remedial legislation was consistently overridden by the Court until the 1930's.

Roscoe Pound, in a careful study in 1909, pointed out that the early eighteenth century exponents of natural law said nothing about this "right of free contract."<sup>52</sup> Their concern was chiefly with security of the person and of property. Liberty of contract emanated as a theory of political economy, specifically as a by-product of Adam Smith's *laissez faire* thinking.<sup>53</sup> Pound described this judicial attitude toward social legislation as individualistic, exaggerating the importance of property and contract and "private right at the expense of the public right."<sup>54</sup>

In 1933, Professor Morris R. Cohen made a similar attack on the social indifference of the courts. He said:

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<sup>51</sup> Pound, *supra* note 49, at 4.

<sup>52</sup> Pound, "Liberty of Contract," 18 Yale L.J. 454 (1909).

<sup>53</sup> *Id.* at 456.

<sup>54</sup> *Id.* at 457.

[T]he bills of rights, originally intended to protect men against political oppression, have become the legal basis of economic exploitation. The principal device by which this has been achieved is the invention of a new legal doctrine previously unknown to jurisprudence, to wit, that the right to make contracts is itself property. The blind acceptance of this new dogma has led to the conclusion—a veritable *reductio ad absurdum*—that a minimum wage law which prevents a human being from working under conditions of starvation is a taking-away of his property.<sup>55</sup>

This judicial intransigence evoked antagonism both to the theory of natural rights and to the social practices it was protecting. The reaction to these principles in the late 1930's and following is well-known. The Supreme Court has overruled its earlier decisions in this area and there is little likelihood that these doctrines will be revived. Remedial state legislation now is presumed to be constitutional, and the exercise of property and contract rights is subject to curtailment in the public interest.

These changes have been instituted by the introduction of new philosophies or the modification of old ones. Thus, Locke has given way to Rousseau with his equalitarian emphasis. Classical Natural Law is experiencing revival and reacceptance in some quarters. Greater stress is being given to social institutions through the application of historical and sociological jurisprudence. And pragmatism has blossomed into a mature concept.

Among these new doctrines is the balancing-of-interests test which is founded on pragmatism, with its concept of fulfillment of expectations. Dean Pound defined an interest "as a demand or desire which human beings . . . seek to satisfy, of which, therefore, the ordering of human relations must take account."<sup>56</sup> A shift is noticeable from one of adjusting the exercise of free wills to one of satisfying wants, where the free exercise of will is merely one of a number of factors. Pound, in following Jhering's classification, distinguished between individual, public and social interests. Thus, the "rights" identified by Justice McKenna in the *Arizona Employers' Liability Cases*, as menacing judgment to all rights and subjecting them to the precepts of

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<sup>55</sup> Cohen, *Law and the Social Order* 149-50 (1933).

<sup>56</sup> Pound, *My Philosophy of Law* 249, 259 (1941).

Glanville Williams objected to this definition of interest because of obscurity. Williams, "Language and the Law," 62 *Law Q. Rev.* 387, 398 (1946). In the area of psychological desire, he contended, one may have rights that one does not desire or is unaware of. But this is polemical. A claim evolves from an event or a relationship of events, and psychological desire may be an incidental or inconsequential factor.



public policy,<sup>57</sup> were identified by Pound as individual interests or individual claims which can be secured through regular legal machinery. The Fourteenth Amendment did not establish these individual rights as "absolute legal rights." In securing such individual rights, policy was embraced by the courts.

Pound indicated that men sought vigorously in the last century "to insure complete security through absolute certainty and uniformity in judicial administration."<sup>58</sup> This was attempted through a code system which failed. It was followed by "a method of mechanical, logical deduction from fixed legal conceptions." But this also was unworkable and in its place was substituted universal definitions of absolute rights. Pound saw these rights expressed as a unital social interest in the general security, but their segmented structure was inadequate to meet the conflicting and overlapping interests of a complex socio-economic system. Thus, another transformation ensued, and the problem of satisfying human claims, demands and desires, and not the machinery of fulfillment, became the constant byword.

Pound, with his penchant for classification, grouped social interests into six categories, with an initial emphasis on general public welfare. However, as Professor W. Friedmann has observed, "As soon as the interests are ranked in a specific order or given any appearance of exclusiveness or permanence, they lose their character as instruments of social engineering and become a political manifesto. Pound himself has inserted a certain evaluation by describing the interests in individual life as the most important of all."<sup>59</sup>

Further, these interests constitute *de facto* claims which are valid in themselves. Thus, the *ad hoc* balancing test contains no principles or guides for judicial decision-making.<sup>60</sup> The effect is to structure a system on group consensus and not on any ideas of what is just and reasonable.

However, while applying the interests test to due process, the Supreme Court does not follow the popular view. Instead, the Court sees due process from a rational standpoint, as a fusion of the rights of the individual and public authority. This ideology was precisely

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<sup>57</sup> 250 U.S. at 439 (1919).

<sup>58</sup> Pound, *supra* note 49, at 9.

<sup>59</sup> Friedmann, *Legal Theory* 296 (4th ed. 1960).

<sup>60</sup> Professor Thomas Emerson described the difficulty in relation to judicial protection to a system of freedom of expression. He admonished that the test "frames the issues in such a broad and undefined way, is in effect so unstructured, that it can hardly be described as a rule of law at all . . . . The *ad hoc* balancing test contains no hard core of doctrine to guide a court in reaching its decision." Emerson, "Toward a General Theory of the First Amendment," 72 Yale L.J. 877, 912 (1963).

expressed by Justice Frankfurter in *Hannah v. Larche*, where the constitutionality of the procedure followed by the Civil Rights Commission in the examination of witnesses was raised:

Since due process is the constitutional axis on which decision must turn, our concern is not with absolutes, either of governmental power or of safeguards protecting individuals. Inquiry must be directed to the validity of the adjustment between these clashing interests—that of government and of the individual, respectively—in the procedural scheme devised by the Congress and the Commission. Whether the scheme satisfies those strivings for justice which due process guarantees, must be judged in the light of reason drawn from the considerations of fairness that reflect our traditions of legal and political thought, duly related to the public interest Congress sought to meet by this legislation as against the hazards or hardship to the individual that the Commission procedure would entail.<sup>61</sup>

The balancing test also has been applied to the provisions of the Constitution which, like the first amendment, are couched in specific language, and do not seem to lend themselves to the range of values created by the balancing of interests. The members of the Supreme Court are in sharp disagreement with the application of the balancing test to such provisions.

This conflict is seen in *Barenblatt v. United States*,<sup>62</sup> which involved a former graduate student and teaching fellow at the University of Michigan who, when summoned to testify before a Subcommittee of the House of Representatives Committee on Un-American Activities, refused to answer questions as to whether he was then or had ever been a member of the Communist Party. Disclaiming reliance on the privilege of self-incrimination and relying on the first, ninth and tenth amendments, he objected to the Subcommittee's inquiry into his "political" and "religious" belief or "other personal or private affairs" or "associated activities." His conviction of a misdemeanor for such refusal was sustained by the Supreme Court.

Justice Black dissented, with Chief Justice Warren and Justice Douglas concurring in the dissent. The majority did not deny the unequivocal words of the first amendment that Congress shall pass no law abridging freedom of speech, press, assembly or petition, and the Committee's activities, in Black's opinion, abridged the first amendment "through exposure, obloquy and public scorn."<sup>63</sup> But the Court permitted this infringement for three reasons, the first of which

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<sup>61</sup> 363 U.S. 420, 487 (1960).

<sup>62</sup> 360 U.S. 109 (1958).

<sup>63</sup> 360 U.S. at 140.

is pertinent to this discussion, holding that despite the language of the first amendment, "Congress can abridge speech and association if this Court decides that the governmental interest in abridging speech is greater than an individual's interest in exercising that freedom."

The dissent objected to the balancing process being applied to laws directly abridging first amendment freedoms. Justice Black argued that the application of the balancing test in such circumstance was like reading the first amendment to say "Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised." He reasserted his view that "the Bill of Rights means what it says," and that it was this meaning which should be enforced. Any other interpretation invited the breach of our great charter of liberty and fostered the application of an indiscernible range of value judgments. In that context, the first amendment and other provisions of the Bill of Rights would be enforced only when the Court believed that the action was reasonable.<sup>64</sup> Such extrapolation, the dissenters argued, runs counter to the *written* Constitution.

Justice Black made a further discerning criticism of the application of the test in this case. He contended that the Court balanced improper factors by weighing the right of government to preserve itself against an individual's right to refrain from disclosing his Communist associations. Such balancing failed to identify and to consider the social interest in the individual's silence "the interest of the people as a whole in being able to join organizations, advocate causes and make political 'mistakes' without later being subjected to governmental penalties for having dared to think for themselves."<sup>65</sup> It is society's interests, rather than the individual's right to silence, which he claimed the Court should weigh against the need for governmental preservation.

This observation is consistent with Pound's thesis. Pound warned that a social interest should only be balanced against a social interest and not against an individual interest. Specifically, in this situation, the interest of the Government to preserve itself should be balanced

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<sup>64</sup> The merits of the issue of governmental security, raised in this case, need not be evaluated here. Each situation, affecting the first amendment and other enumerated rights, to which the balancing test is applied requires independent consideration.

A real danger of the balancing test, Justice Black warned elsewhere, is that in times of emergency and pressure the government is given the power to act as it thinks necessary to protect itself, regardless of individual rights. Black, "The Bill of Rights," 35 N.Y.U.L. Rev. 865, 878 (1960).

<sup>65</sup> 360 U.S. at 144.

against the public's interest in free association and free political advocacy and not against the individual's right as a person to refrain from revealing Communist affiliations. To state the question in terms of social and individual interests is to invite a predetermination of the solution. As Pound said, "In weighing or valuing claims or demands with respect to their claims or demands, he (we) must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest we may decide the question in advance in our very way of putting it."<sup>66</sup> Here, it could mean predetermining Barenblatt's guilt.

But in another sense, Justice Black's position was paradoxical. He acknowledged that in cases which primarily regulate conduct and only indirectly affect speech, the balancing test is acceptable "if the effect on speech is minor in relation to the need for control of the conduct."<sup>67</sup> Thus, the right of a city to control its streets<sup>68</sup> or to prohibit the distribution of handbills to prevent littering<sup>69</sup> are recognized. But if free speech is an immunity, as we previously observed, the government has no power to restrain the speech of an individual, even to regulate human conduct. It is not a matter of degree, but of power, and if logic is to prevail, the government cannot properly assume power if it lacks it. Why in the regulation of conduct does the absolutist give conduct primacy over free speech? The answer, perhaps, is based on practicality, rather than logic or theory, since the government could not long exist without placing some necessary restraints on individuals.

Another criticism of the balancing approach, voiced by Justice Black, is that it restores us to the state of legislative supremacy which our Founding Fathers tried to avoid.<sup>70</sup> Under this arrangement, our form of government is changed from one of limited powers to a government in which Congress is free to do anything that the Court considers "reasonable." The judiciary is denied its constitutional power to evaluate acts of Congress in accordance with criteria established in the Bill of Rights. The Court, concurrently with Congress, has even greater power, "that of overriding the plain commands of the Bill of Rights on a finding of weighty public interest."<sup>71</sup>

But Black argued that this balancing was achieved by the

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<sup>66</sup> 3 Pound, *Jurisprudence* 328 (1959).

<sup>67</sup> 360 U.S. at 141.

<sup>68</sup> *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>69</sup> *Schneider v. Irvington*, 308 U.S. 147 (1939).

<sup>70</sup> Black, *supra* note 64, at 878-79.

<sup>71</sup> *Id.* at 879.

Framers, when they wrote the Constitution and the Bill of Rights, and should not be repeated. Each safeguard required a balancing of interests which the Framers decided, regardless of the risks involved. Thus, protecting speech might involve dangers to a government; strict procedures might free guilty men. In Justice Black's opinion, the Constitution settled differences where disparate values prevail as to individual liberties. He contended that these differences have been composed and should not be changed without constitutional amendment.

Ontologically speaking, this was an attempt to explain the source of rights. But as an interpretation it embodied an immutable concept of natural rights, which was neither intended by the Framers nor by the Classical Natural Law theorists. Natural rights are not innate, self-contained essences in the Platonic sense as Justice Black views them. Neither are they discrete in and of themselves. Instead, as we have observed, they are acquired, won, derived and obtained. Hence, they are subject to change, as mores and ethics change.

Justice Black's position is not jurally tenable. The judicial action affecting natural rights is subject to two opposing jural viewpoints. One, in the Kent tradition, identifies new subsumptions within constant categories or concepts.<sup>72</sup> The other reflects an extension of rights into new categories or concepts. If they are subsumptions under the traditional meaning, then they are "absolutes" or immunities. On the other hand, if they are new concepts, such "rights" or claims are relative within Kent's scheme. In other words, are the social and economic rights enumerated by Pope John, Maritain and others new rights, and hence relative, or are they merely the extension of the rights of liberty, property and security, and hence "absolute"? If relative, they fall under civil rather than constitutional claims. Obviously, Justice Black invokes the more conservative theory, prescribing as constitutionally protected rights those which are enumerated.

Justice Black has also attacked the balancing test as being historically repressive of individual liberty. In his dissent in *Communist Party v. Subversive Activities Control Bd.*,<sup>73</sup> he stated that "the dangerous constitutional doctrine of 'balancing' . . . has been the excuse of practically every repressive measure the government has ever seen fit to adopt." Dean Erwin Griswold viewed this verbal attack as an exaggeration but admitted that the balancing approach is susceptible

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<sup>72</sup> Freund, "An Analysis of Judicial Reasoning," in *Law and Philosophy: A Symposium* 288 (Hook ed. 1964).

<sup>73</sup> 367 U.S. 1, 164 (1961).

to such assault.<sup>74</sup> Certainly, during periods of political and social tensions, the Court has stressed the theory, applying it without full or convincing explanation.

Dean Griswold introduced as a by-product of his discussion, a new approach as a substitute to the balancing test.<sup>75</sup> He described it as the "comprehensive" or "integral" method "since it involves looking to the text of all of the Constitution, and . . . in proper cases, to the 'unwritten Constitution', examining and considering fully all relevant texts and conditions of our constitutional system, and integrating all together in reaching the ultimate solution." The Court examines all constitutional provisions in their total setting, reaching its conclusion in relation to all relevant language and factors. This is an extension beyond the absolutist's approach who concentrates his attention on the specific language of the Constitution, ignoring all other considerations. However, it is difficult to distinguish Griswold's approach from the balancing test prescribed by Justice Frankfurter in the *Hannah* case for due process matters.

Another major weakness of the balancing test was previously alluded to—the absence of guideposts in choosing between conflicting interests. Although Pound recognized that certain interests are to be encouraged and sponsored, he failed to rank individual and social interests in relation to their importance. The determinations, which are made in assigning such preferences, bring to the forefront questions of value judgment and decisions of social policy. The directions these judgments take are very important, and mark the course of social conduct. Without the valuation of such interests, society can flounder. As one commentator suggested, "Without measuring rods . . . the adjustment of such interests would be left either to chance or happenstance, with fatal consequences for social cohesion and harmony, or to the arbitrary fiat of a group having the power to enforce it."<sup>76</sup>

Much of the difficulty is apparently due to the great emphasis Pound placed on pragmatic thinking in the application of the balancing test. Asserted demands of the public, under this arrangement, are stressed to the detriment of reasonable claims. Thus, the balancing theory rests on the shifting sands of public demand rather than on a comprehension of and an evaluation of social requirements.<sup>77</sup>

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<sup>74</sup> Griswold, "Absolute Is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions," 8 Utah L. Rev. 167 (1963). See also Frantz, "The First Amendment in the Balance," 71 Yale L.J. 1424 (1962).

<sup>75</sup> *Ibid.*

<sup>76</sup> Bodenheimer, Jurisprudence 263 (1962).

<sup>77</sup> One is reminded of Edmund Burke's critical comment about natural rights: "By having a right to everything they (people) want everything." 2 Works of Edmund Burke 332 (Standard Library Ed. 1906).

### B. *The Libertarian Theory*

Another theory of natural rights has evolved through jural construction and constitutional interpretation. This can be described as the "libertarian" approach, in which an emphasis is placed on human freedom and dignity. The exponents of this theory, which includes such eminent jurists as Brandeis and Douglas, are supporters of civil liberties, rather than harbingers of natural law. They adapt to each social situation the fundamental principle that individual freedom is the objective of civilized society. The ultimate goal of the state is the guarantee of freedom to the ordinary individual, with maximum opportunity for him to develop his faculties, to realize his ambitions, and to satisfy his desires. Thus, as Brandeis stated in his famous *Olmstead* dissent:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect American beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.<sup>78</sup>

Brandeis' thesis was that an extension of individual rights is essential to cope with new encroachments and abuses as they are socially designed and furthered. In this context, the right to be let alone is the matrix of a full sphere of constitutional protections and safeguards.

Mr. Justice Douglas repeatedly has emphasized the same thesis in clear terms.

Government exists for man, not man for government. The aim of government is security for the individual and freedom for the development of his talents. . . . There is, indeed, a congeries of these rights that may conveniently be called the right to be let alone. They concern the right of privacy—sometimes explicit and sometimes implicit in the Constitution. This right of privacy protects freedom of religion and freedom of conscience. It protects the privacy of the home and the dignity of the individual. . . .<sup>79</sup>

In discussing the right to be let alone, I have spoken . . . mostly of opinions, beliefs, and matters of conscience. But the right of privacy covers another domain. I refer to the sanctity of the home and the right of the citizen to be unmolested there, either by peeping toms or by lawless police on a raid. . . .<sup>80</sup>

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<sup>78</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

<sup>79</sup> Douglas, *The Right of the People* 87 (1958).

<sup>80</sup> *Id.* at 144. But elsewhere in the same lectures, Justice Douglas spoke in almost

Under this theory, the privacy of the home and the dignity of the individual encompass a full range of modern activities which should be protected. They cover wiretapping and the use of electronic devices to elicit private conversations. They extend to the issue of the captive audience on streetcars,<sup>81</sup> and the right to travel.<sup>82</sup> And, as Justice Douglas indicated, they draw their substance from penumbras.

### C. *The Privileges Theory*

We conclude the catalogue of theories of natural rights with a less popular doctrine—the privileges approach.<sup>83</sup> This thesis invokes the principle that natural rights are privileges granted by the state; therefore, they are not inalienable and are subject to interpretative limitations and judicial inclusions and exclusions, as are any other state-produced law, although these rights are subject to the common good. The free person is a creation of the state, and an individual achieves his rights through the state. Thus, as Hegel asserted, the state is the superior realization of the moral idea. The individual has liberty

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traditional natural-law language: "The penumbra of the Bill of Rights reflects human rights, which though not explicit, are implied from the very nature of man as a child of God. These human rights were the products both of political thinking and of moral and religious influences." *Id.* at 89-90. In fact, one writer concluded that Justice Douglas believes "that privacy is a fundamental right derived from natural law." Comment, 60 Nw. U.L. Rev. 813, 815 (1966). But the last quoted sentence, above, which the writer omitted, seemingly removed him from the sphere of traditional natural-law thinking. Justice Douglas argued that human rights are politically, morally and religiously conditioned—a step removed from natural law.

<sup>81</sup> *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952).

<sup>82</sup> *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Edwards v. California*, 314 U.S. 160 (1941).

<sup>83</sup> A classification of abstract concepts is precariously elusive and fraught with uncertainties and danger. My hope is that in these groupings injustice has not been done to individuals and that viewpoints were not innocently misinterpreted. Neither should this arrangement be suggestive of a complete inventory of jural theories relating to the Constitution.

Mr. Justice Brennan has observed that the following theories have been invoked to interpret the first amendment: the absolute view, "redeeming social value," "clear and present danger" and "balancing" tests. The "redeeming social value" test primarily pertains to obscenity cases, and the "clear and present danger" test primarily affects subversive activity. As he noted, each has operated to meet specific regulation and does not have "an across-the-board application." Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," 79 Harv. L. Rev. 1 (1965). Mr. Justice John Archibald Campbell, who served on the Supreme Court from 1853 to 1861, was utilitarian in his interpretation of the contract clause. See Schmidhauser, "Jeremy Bentham, The Contract Clause and Justice John Archibald Campbell," 11 Vand. L. Rev. 801 (1958). For a due process arrangement see Bodenheimer, *supra* note 43.



only through the state and only in the state is there a fusion of the will of the individual and the general will. This, of course, is a rejection of the theories of natural rights as traditionally espoused.

Rights do not come to us from nature, which knows no right except cunning and strength; they are privileges assured to individuals by the community as advantages to the common good. Liberty is a luxury of society; the free individual is a product and a mark of civilization.<sup>84</sup>

This theory has been applied occasionally and peripherally in lacunal interpretations of natural rights. This is especially discernible in defining the police power of the state. In the *Billado* case the defendants' application for a first-class license to sell malt and vinous beverages in their restaurant was denied without a hearing.<sup>85</sup> The Vermont Supreme Court held that although the economic right of doing business is a natural right, the sale of intoxicating liquors is not, and if it is a right at all it is subject to the police power of the state. The Court concluded that it is a mere privilege which may be granted, denied or withdrawn by the state.

In a similar situation, the United States Supreme Court held earlier that a citizen had no inherent right to sell intoxicating liquors by retail.<sup>86</sup> But the Court went further, arguing that it is neither a privilege of a citizen of a state or of a citizen of the United States. "As it (selling intoxicating liquors) is a business attended with danger to the community it may . . . be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils."<sup>87</sup> Nonetheless, this constitutes a privilege. But adverting to Lockian concepts, Mr. Justice Field observed that even liberty, the greatest of all rights, is not unrestricted license. "It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law."<sup>88</sup> Within the police power, "the possession and enjoyment of . . . rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community."<sup>89</sup>

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<sup>84</sup> Durant, *Our Oriental Heritage* 29 (1942).

This is not to be confused with "privileges and immunities," as the phrase is used in the Constitution.

<sup>85</sup> State *ex rel.* Billado v. Wheelock, 114 Vt. 350, 45 A.2d 430 (1946).

<sup>86</sup> Crowley v. Christensen, 137 U.S. 86 (1890).

<sup>87</sup> 137 U.S. at 91.

<sup>88</sup> 137 U.S. at 89-90.

<sup>89</sup> 137 U.S. at 89.

## VI. THE RIGHT OF PRIVACY

Two substantial jural issues were presented by the *Griswold* case: (1) Is the right of privacy a natural right? (2) If so, is it constitutionally protected? If these questions are answered affirmatively, an ancillary issue is raised. Is forbidding the use of contraceptives an invasion of that right?

The principle that the right of privacy is a natural right is supported by several theories. It is in accord with Classical Natural Law thinking, as demonstrated by Article 12 of the *Universal Declaration of Human Rights*. The *Declaration*, based on natural law, states that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation."

Traditional natural law also has given support to this thesis. In the landmark case of *Pavesich v. New England Life Ins. Co.*,<sup>90</sup> the Georgia Supreme Court applied the immunity rule to the right of privacy in tort law. The Court said:

The right of privacy, or the right of the individual to be let alone is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person.<sup>91</sup>

As was previously noted, the concept also received approbation from the libertarians. This was underscored in Mr. Justice Brandeis' dissent in the *Olmstead* case, in which he argued that the right of privacy should be protected as a violation of the fourth amendment, although the majority held that petitioner's privacy had not been invaded in the absence of a technical search and seizure.<sup>92</sup>

Constitutional protection of the right to be let alone also derives substance from Mr. Justice Douglas' thesis that the guarantee emerges from several provisions of the Constitution, including the fourth and fifth amendments.<sup>93</sup> The right of privacy as an independent right, apart from protection of the individual in criminal proceedings, emerged from the "liberty" concept in the fifth and fourteenth amendments. In *York v. Story*,<sup>94</sup> the ninth federal circuit held that privacy was

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<sup>90</sup> 122 Ga. 190, 50 S.E. 68 (1905).

<sup>91</sup> *Id.* at 213, 50 S.E. at 78.

<sup>92</sup> See Comment, "Privacy After *Griswold*: Constitutional or Natural Law?" 60 Nw. U.L. Rev. 813 (1966) for a history of the Supreme Court's activity in this area as it relates to search and seizure and other developments.

<sup>93</sup> Douglas, *op. cit. supra* note 79, at 88.

<sup>94</sup> 324 F.2d 450 (9th Cir. 1963). This action was brought by the plaintiff against three police officers to recover damages under the Civil Rights Act for taking and distributing photographs of her in the nude. The plaintiff had come to the police station to complain of an assault. One defendant, acting under color of his authority and over

protectable under the due process clause of the fourteenth amendment.

The concept of privacy was extended to include anti-contraceptive law in *Poe v. Ullman*.<sup>95</sup> In his dissent in the *Poe* case, Justice Douglas contended that the right of privacy covered the Connecticut law<sup>96</sup> and that the law deprived petitioners, a married couple, of "liberty" without due process of law under the fourteenth amendment. However, "due process" in that context is not restricted and limited to the first eight amendments.<sup>97</sup> Freedom to travel, the right "to marry, establish a home and bring up children," and the right of privacy of captive radio audiences were cited by Justice Douglas as evolvments of other specific assurances. "Liberty", under this thesis, "gains content from the emanations of other specific guarantees . . . or from the experience with the requirements of a free society."<sup>98</sup>

In the *Griswold* case, Mr. Justice Douglas pursued the same thesis but did not repeat the formulary principles which he developed in *Poe*. However, in *Griswold* he placed greater emphasis on the penumbras, which are created among the specific guarantees in the Bill of Rights and the emanations formed from them. The penumbras are not a new and novel notion, as has been suggested, but have a derivative, not a different content.<sup>99</sup> The emanations form what Justice Douglas described as "zones of privacy," such as the right of association, the prohibition against the quartering of soldiers in any house in time of peace without the consent of the owner, and the right against self-incrimination.

Significantly, Justice Douglas stated "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from these guarantees that help give them life and substance."<sup>100</sup> He then made

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plaintiff's objections, photographed her in the nude and in indecent positions. The Court held that such acts constituted an arbitrary intrusion upon the security of her privacy, as guaranteed to her by the due process clause of the fourteenth amendment. Therefore, a foundation for proving her claim under the Civil Rights Act was laid.

<sup>95</sup> 367 U.S. 497 (1961). The inclusion of the Connecticut anti-contraceptive law under privacy would receive doubtful Classical Natural Law support.

<sup>96</sup> Conn. Gen. Stat. Rev. § 53-32 (1958 rev.): "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

<sup>97</sup> 367 U.S. at 515.

<sup>98</sup> 367 U.S. at 517. For a criticism of the penumbral doctrine see Bodenheimer, "Birth Control Legislation and the United States Supreme Court," 14 Kan. L. Rev. 453 (1966).

<sup>99</sup> Comment, *supra* note 92, at 825.

<sup>100</sup> 381 U.S. at 484. One may question the conclusiveness of analogical reasoning, but that is not germane to the immediate issue. Case discussion is essentially limited to jural questions.

a referential statement: "See *Poe v. Ullman*, 367 U.S. 497, 516-522 (dissenting opinion)." In the dissenting opinion to *Poe*, Justice Douglas elaborated on the libertarian theory. He incorporated this approach by reference in the *Griswold* case, using the penumbra to support that thesis. Thus, the full meaning of the concept is best achieved by reading the two opinions together.

Justices Harlan and White, in two concurring opinions, followed a more expansive treatment of the libertarian concept. They approved it, but its endorsement was achieved by utilizing infringement of due process without the penumbral appendage. Justice Harlan felt that the Connecticut statute infringed the due process clause of the fourteenth amendment because the law violated fundamental values "implicit in the concept of ordered liberty."<sup>101</sup> Inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, but the protection is not dependent on them. As Justice Harlan graphically stated, "The Due Process Clause of the Fourteenth Amendment stands . . . on its own bottom."

Justice Black, in his dissent, rejected the due-process argument which Justices Harlan and White espoused, contending that it reflected the same "natural law due process philosophy" embodied in *Lochner* and other cases. He did not believe that the Supreme Court was granted power by the due process clause or other constitutional provisions to measure constitutionality "by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of 'civilized standards by conduct.'" Justice Black considered such evaluation of legislation as an element in the legislative law-making process and not within the interpretative power of the courts. Therefore, such authority should remain with Congress and the States, who formulate laws in accordance with their own judgment of "fairness and wisdom." The courts, in his opinion, should not substitute their judgment for that of the legislature.

But it would seem that Justices Harlan and White did not, as Justice Black suggested, invoke a natural-law theory. Instead, they

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<sup>101</sup> 381 U.S. at 500 quoting from *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

This theory of Justice Harlan also has been identified as the "ordered liberty" approach. Comment, "The Supreme Court, 1964 Term," 79 Harv. L. Rev. 56, 163 (1965). However, neither it nor the penumbral approach reflects significant philosophical differences; nor do they vary much in their results. For these reasons they were given a common designation.

Justice Harlan also argued that the majority opinion implicitly endorsed the theory that the "incorporation" doctrine may be used to narrow the scope of fourteenth amendment due process.

applied a functional approach, recognizing distinctive differences between the freedoms protected by the Constitution. It is such interpretation which has fostered "preferred freedoms" as an ideological principle in the areas of civil and political rights. The *Griswold* case is a further projection of this thesis, extending the constitutional protection of social rights to aspects of the right of privacy. And in the application of the functional approach, the justices referred to theories other than natural law for their support, e.g., the libertarian theory.

Mr. Justice Goldberg's concurring opinion in *Griswold* is expressive of another important jural approach, which previously has not been discussed, the historical treatment.<sup>102</sup> He departed from the natural-law theory in the determination of fundamental rights not mentioned in the Constitution, which should be protected. To ascertain what these rights are, Justice Goldberg would not search the precepts of natural law or leave it to the preferences of individual judges but would rest the determination on "the traditions and (collective) conscience of our people."<sup>103</sup>

Mr. Justice Black, in his *Griswold* dissent, was critical of this historical approach. He asked how judges could avoid applying their personal notions in cases where the ninth amendment as well as the due process clause were used by the Supreme Court to declare state statutes unconstitutional. Computerized information is not available to the Court to determine what traditions are rooted in the "(collective) conscience of our people."

Chief Judge Learned Hand recognized that a court had no way to determine what the "common conscience" at a time may be.<sup>104</sup> It might mean the judgment of "some ethical elite" or a plurality approving a specific conduct. In the latter situation, it would be absurd to try and make such a calculation. Judge Hand did not find general principles helpful as guides, for "almost every moral situation is unique." He finally concluded that courts are confined to "the best guess" of the result of a poll, and from that the content of the "common conscience" would be derived.

Justices Black and Stewart dissented, in separate opinions, on the theory that the due process clause placed only such limitations on the states as were specifically enumerated in the provisions of the Bill of Rights or were incorporated in due process.<sup>105</sup> Although both

<sup>102</sup> He also stressed the ninth amendment as being within the "protected penumbra of specific guarantees of the Bill of Rights." 381 U.S. at 487.

<sup>103</sup> 381 U.S. at 493, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

<sup>104</sup> *Johnson v. United States*, 186 F.2d 588 (2d Cir. 1951).

<sup>105</sup> Mr. Justice Stewart disagreed with Mr. Justice Black's thesis that the fourteenth amendment incorporates all that is contained in the first eight amendments.

dissented, Justice Stewart followed the traditional approach while Justice Black applied the absolute test. Justice Black objected to the Court's identification of "right of privacy" as if it were embodied in some constitutional provision or provisions, which forbade any law ever to be passed affecting the abridgment of "privacy." There is no such explicit prohibition. Justice Black recognized, however, that guarantees in certain specific constitutional provisions were intended "in part" to protect privacy, under certain circumstances. The fourth amendment's guarantee against "unreasonable searches and seizures" was an example of such a restriction.

Justice Black declared that "One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning."<sup>106</sup> The right of privacy was an ambiguous, uncertain substitute for searches and seizures and, in his opinion, was subject to the vagaries of broad or narrow interpretations. Justice Black objected to the invalidation of state law, based on a jurally indeterminate formula of "natural justice," in the absence of specific constitutional limitation. He found this formula no less dangerous, as applied to human rights, than when used to enforce economic rights.

Implicit in his emphasis is a developmental pattern of analytical jurisprudence. Justice Black stressed the meaning of the constitutional provisions in their historical setting and was critical of generalities embodied in natural law. He did not distinguish among several views or formulas, which he grouped under the caption "natural justice," and argued that they had the same meaning. But, as we have seen, there are significant distinctions among the philosophies, as applied to the Constitution, although the Constitution is framed in natural-law language. These distinctions have marked relevance in formulating diverse jural conclusions. Clearly, the libertarian approach of Justices Douglas and Harlan and the "balancing" test are distinguishable from each other and from Classical Natural Law, from Locke's philosophy and from Justice Stewart's traditional emphasis. In fact, Justice Black's absolute rule is rooted in Lockian thought, which further differentiates natural law from other philosophical theories.

Other authorities have supported the analytic interpretation of the Constitution. Dean Edward Levi stated, "Granted the right and duty of the court to interpret the document, it has not been given the

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<sup>106</sup> 381 U.S. at 509.

duty or the opportunity to rewrite the words."<sup>107</sup> Case law is acceptable by a later court through an interpretation of words, but reasoning by example justifies case acceptance on a different theory. However, Dean Levi did not view such constitutional interpretation as a basis for projecting a theory, which can be safely followed in the future. Conflicting values in shifting constitutional interpretation make this projection problematic.

Professor Herbert Wechsler's contrary argument is "that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."<sup>108</sup> Cases should be decided on "grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply."

But changes in constitutional interpretation are made for various reasons. They include "shifting mores, new ethical standards on a demonstrated need for more economical or workable or fruitful formulations."<sup>109</sup> As Professor Paul Freund noted, the emergence of the concept of privacy is a notable example of this process of change.<sup>110</sup>

Dean Levi is among those who have criticized the Supreme Court for its methods in reaching decisional results. In the desegregation case,<sup>111</sup> the Court rooted its decision in social considerations, ignoring traditional theory. Dean Levi argued that it is possible that the same conclusion ought to have been reached in that case, "but with less of an immediate jump and on the partial basis of an old and accepted theory."<sup>112</sup>

Levi's position suggests the application of variegated jural theory. However, such adaption would not always provide desired results in policy. When there is no difference in result, an interchange of theories presents no problem, although it might raise some serious ethical considerations. The *Brown* case conforms to this symmetrical pattern, but the *Griswold* case raises another problem, in which the results vary according to conflicting theories. It is doubtful that Classical Natural Law theorists would find the conclusion of the *Griswold* case acceptable.

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<sup>107</sup> Levi, "The Nature of Judicial Reasoning" in *Law and Philosophy: A Symposium* 274 (Hook ed. 1964).

<sup>108</sup> Wechsler, "The Nature of Judicial Reasoning," *id.* at 293-94. See Wechsler, "Toward Neutral Principles of Constitutional Law," 73 *Harv. L. Rev.* 1 (1959).

<sup>109</sup> Freund, "An Analysis of Judicial Reasoning," in *Law and Philosophy: A Symposium* 283 (Hook ed. 1964).

<sup>110</sup> *Ibid.*

<sup>111</sup> *Brown v. Bd. of Education*, 347 U.S. 483 (1954).

<sup>112</sup> Levi, *op. cit. supra* note 107, at 275.

Neither is the traditional approach, as expressed by Justice Stewart, conformable to the majority opinion. Policy, therefore, is not coextensive, nor is it subject to a unital pattern.

The *Griswold* case stands somewhere near the lacunal fringes between Levi's "unpredictable" and Wechsler's "neutral principles." The case suggests the use of the inductive method in reassessing familiar relationships and in evaluating new functions. In the predictable future, framed in the philosophy of the libertarians, a variety of "private rights" may be given constitutional efficacy by judicial inclusion. An assessment of rights, favorable to the pursuit of happiness, may extend assurances beyond economic and social satisfactions to protect, in Brandeis' words, "American beliefs, their thoughts, their emotions and their sensations." The right to be let alone may, in actuality, become "the most comprehensive of rights and the right most valued by civilized men."

#### CONCLUSION

It should not be disquieting that so many approaches have been used in applying this phase of constitutional theory in our democracy, for it reflects the dynamism of a pluralistic society. It is to our everlasting credit that our social instruments have been adapted to meet changing times and conditions. Perhaps, in some measure, this explains the success of our democracy and shows why we have made such significant and continuous progress through 175 years of constitutional government. Neither should we despair for lack of a unital philosophy on the Supreme Court. There, also, the struggles, needs and aspirations of a disparate society are reflected. Unlike the monolithic English who follow utilitarian theory, we are a people of many voices and numerous thoughts. But so long as we permit those voices to be heard and to challenge our moves, we have naught to fear. Hopefully, by communication, reflection and understanding, we will find our way to even greater social heights.